Supreme Court, U.S.
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No. 01-788

In the
Supreme Court of the United States

EDWARD MAURICE COOPER,
a/k/a Hamid Abdul Wadud,
Petitioner,

v.

SHERYL HVASS,
Commissioner of Corrections, MN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY

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ARGUMENT

I. COOPER WAS DENIED THE ASSISTANCE OF COUNSEL WHEN HE WAS DEPRIVED OF COMMUNICATING WITH HIS TRIAL ATTORNEY.

The facts are clear and Petitioner does not contest the state court findings as provided in Respondent's brief for the Court's review. However, Petitioner contends that despite the correct factual findings by the state court, the failure of the court to properly apply clearly established precedent justifies, authorizes and requires this Court to grant Petitioner's Writ of Certiorari.

1. *Strickland* Is Not The Proper Constitutional Standard to Apply.

The facts of the case at bar require the application of United States v. Cronic, 466 U.S. 648 (1984), rather than the two-pronged test of Strickland v. Washington, 466 U.S. 668 (1984). The two-pronged test as set out in Strickland, applies to attorney errors, strategic errors, and error in attorney performance. See Strickland v. Washington, 466 U.S. The facts of the case and the factual findings of the state court require that the court presume prejudice due to the constructive denial of counsel. See United States v. Cronic, 466 U.S. 648, 659 (1984).

Respondent refers to the "sheer absence of an interpreter" in its brief as if the presence of an interpreter at their attorney client meetings is a mere privilege, rather than a necessity to communicate with counsel. Thus, it is not ironic, as Respondent suggests, that if Mr. Cooper had an ASL interpreter available at all of his meetings with his counsel, that he would be required to prove prejudice; rather, it is clear that the patent failure to provide the interpreter at over half of the meetings only exaggerates the structural flaws in his

counsel's attempts to communicate with Petitioner. The only irony is that Mr. Cooper is deaf, does not *speak* English, can hardly speak at all but to make loud incomprehensible sounds, and his trial attorney did not provide an ASL interpreter so that he could communicate with his client and prepare for trial.

Respondent also suggests that the fact that present counsel of record met with Mr. Cooper without an ASL interpreter is somehow significant. The *facts* are that this initial introductory meeting was simply that, introductory. The record would reflect that this initial meeting was brief and no trial matters were discussed because it became immediately apparent to Mr. Goins, Petitioner's current counsel of record, that any communication was impossible without an interpreter, and that is why that first meeting was the only meeting without an ASL interpreter. This introductory meeting was significantly different from the pre-trial and trial meetings between Petitioner and his trial counsel.

Due to the failed communication between Mr. Cooper and his trial attorney, Mr. Cooper was unable to even allege that his communication of exculpatory evidence to Mr. Redburn was not understood. No one can determine how much information was lost through their failed communication. The facts of this case require the application of Cronic. Prejudice must be presumed due to the constructive denial of counsel and the error-correcting function of this Court is required.

2. Ensuring That Deaf Criminal Defendants Are Entitled to Their Constitutional Right to the Effective Assistance of Counsel Is a Matter of Public Import That Supports a Grant of Certiorari.

The societal and legal impact of requiring a criminal defendant to prove that he was prejudiced due to his inability

to communicate with his attorney during their preparation for trial, or even during the trial is something no court can calculate. Respondent attempts to downplay and patronize Petitioner's argument that this requirement sets a frightening precedent. However, this decision very well could be the first of many where criminal defendants are denied the assistance of counsel due to an utter inability to communicate with their attorney, and in order to remedy this constitutional wrong, they will be forced to prove that the results of the proceeding would have turned out differently. Without a crystal ball, no person could possibly prove this to any court, and it is foreseeable that a court would not accept the evidentiary value of a crystal ball.

Mr. Cooper is not complaining that he was prejudiced by the absence of an interpreter from one pretrial meeting. Mr. Cooper is not complaining that he was prejudiced by the absence of an interpreter from two pretrial meetings. Mr. Cooper is not complaining that he was prejudiced by the absence of an interpreter from three pretrial meetings. Mr. Cooper is not complaining that he was prejudiced by the absence of an interpreter from four pretrial meetings. Mr. Cooper is claiming that he was prejudiced by the fact that an interpreter was absent from five of their eight pretrial meetings with his trial attorney.

However, Petitioner does not believe he must quantify the damage. Simply put, not being able to communicate, or in the language of the hearing, not being able to talk to your attorney, amounts to a constructive denial of counsel. The fact that this criminal defendant is deaf is of extreme public import because of the stigma society has for deaf individuals and its prevalent misunderstanding of their disability and struggle to function in a hearing world.

II. SIMULTANEOUS REPRESENTATION OF A CRIMINAL DEFENDANT AND THE MOTHER OF THE DEFENDANT'S ALLEGED VICTIM IS A CONFLICT OF INTEREST WARRANTING A GRANT OF CERTIORARI.

Again, Petitioner does not dispute the factual findings of the state court, however, Petitioner does dispute the test that was applied by the court to determine whether this conflict of interest prejudiced Mr. Cooper. The correct test to apply is that in Holloway v. Arkansas, 435 U.S. 475 (1978). Mr. Cooper's attorney brought the conflict to the attention of the trial court, at which time a brief discussion occurred with the defendant's knowledge or attendance. This objection created a burden for the trial court to make an adequate inquiry into the conflict to determine if such conflict would prejudice the defendant. Such an inquiry did not take place here.

The court misapplied Cuyler v. Sullivan, 446 U.S. 348 (1980) and again put a burden on Mr. Cooper to prove how he was prejudiced by the conflict of interest. The type of conflict in this case does not require Mr. Cooper to prove how he was prejudiced; rather, prejudice is presumed in such a case due to the timely objection of counsel and the court's failure to conduct an adequate inquiry.

Defense counsel's and the prosecutor's information regarding the mother's divorce action was incorrect. The divorce had not been final for three years, and in fact the representation and divorce was not yet completed at the time of Mr. Cooper's trial. Petitioner need not insinuate that the prosecutor misrepresented facts; however, the information given to the trial court was plainly factually incorrect. The great possibility for misinformation and mistakes is why Holloway requires an adequate judicial inquiry into actual conflicts of interest so that the court can make a final determination whether the conflict will prejudice the defendant.

Holloway does not state that the court need not inquire if the attorneys, as officers of the court, have ethically determined that no conflict of interest exists or that the presence of any conflict will not impede the defendants representation. See Holloway v. Arkansas, 435 U.S. 475, 485-86 (1978). No inquiry was made here, and the misinformation allowed Mr. Redburn to labor under an actual, prejudicial and quite severe conflict of interest.

Holloway does not require that the defendant prove that he was adversely affected by the conflict of interest. Additionally, the fact that Mr. Cooper's motion for a new trial was denied has no bearing on whether the trial court, at the time Mr. Redburn brought the potential conflict of interest to its attention, adequately inquired into the nature of the conflict. Because the trial court failed to follow clearly established precedent as dictated by Holloway, and because the federal courts failed to recognize the misapplication of this clearly established Supreme Court precedent, this Court must grant certiorari to correct the wrongs and injustices suffered by Mr. Cooper.

CONCLUSION

Mr. Cooper was denied a fair trial due to the structural denial of his Constitutional right to the effective assistance of counsel. Additionally, the trial court failed to adequately inquire into the conflict of interest that existed throughout his trial and representation by Mr. Redburn. The courts below failed to apply clearly established Supreme Court precedent to these issues. Accordingly, the Court should grant certiorari to correct these misapplications.

Respectfully submitted,

Dated: March 5, 2002

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